Filed 2/27/12 P. v. Hass CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD WAYNE HASS, Defendant and Appellant.	E052362 (Super.Ct.No. FVI801782) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Donald Wayne Hass contends that he is entitled to 76 additional conduct credits under the January 25, 2010 amendment of Penal Code[1] section 4019 (Sen. Bill No. 3X 18 (2009-2010 3d Ex. Sess.), Stats. 2009, ch. 28, § 50),[2] and the September 28, 2010 amendment to section 2933 (Sen. Bill 76, Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010).[3] He also contends that equal protection requires that he receive the additional presentence custody credits. We affirm.

PROCEDURAL BACKGROUND[4]

Case No. FVI801782 (*the first case*)

A jury found defendant guilty of driving under the influence of alcohol with four prior convictions within the meaning of Vehicle Code sections 23550 and

---

[1] All further statutory references will be to the Penal Code, unless otherwise noted.

[2] We note that section 4019 has been amended twice since January 2010, but those amendments only apply to crimes committed after certain dates. The discussion in this opinion concerns the amended version of section 4019 that became effective on January 25, 2010. Thus, any reference to section 4019 concerns the January 25, 2010 version of section 4019. Any reference to "former" section 4019 concerns the version of section 4019 that was in effect prior to January 25, 2010.

[3] Section 2933 was recently amended, effective October 1, 2011. The discussion in this opinion concerns the amended version of section 2933 that became effective on September 28, 2010. (Stats 2010, ch. 426 (Sen. Bill 76), § 1.) Thus, any reference to section 2933 or amended section 2933 concerns that version.

[4] The facts underlying defendant's convictions are not relevant to the determination of the issue on appeal. The procedural background is relevant. The statement of the procedural background is taken from the nonpublished opinion issued by this court in *People v. Hass* (Nov. 23, 2009, E047475). This court took judicial notice of the record in case No. E047475 on its own motion.

23550.5 (Veh. Code, § 23152, subd. (a), count 1); driving while having a 0.08 percent or higher blood-alcohol content with four prior convictions within the meaning of Vehicle Code sections 23550 and 23550.5 (Veh. Code, § 23152, subd. (b), count 2); and driving when his license had been suspended for a prior driving under the influence (DUI) conviction (Veh. Code, § 14601.2, subd. (a), count 3). The trial court found true the allegations that defendant had four prior DUI convictions, and that he had served one prior prison term within the meaning of Penal Code section 667.5, subdivision (b). On December 4, 2008, the court sentenced him to a total of four years in state prison.

Case No. FVI802108 (*the second case*)

Defendant was subsequently charged in case No. FVI802108. Pursuant to a plea agreement, he pled guilty to a violation of Vehicle Code section 23152, subdivision (a), and admitted he committed that offense while he was out on bail in the first case. On January 21, 2009, pursuant to the terms of the agreement, the court vacated the original sentence in the first case and imposed a three-year term. It then imposed a term of two years eight months in the second case and ran it consecutive to the sentence in the first case, for a total term of five years eight months. The court awarded defendant 204 presentence custody credits (136 actual and 68 conduct). The court later granted appellate counsel's request to amend the abstract of judgment and ordered the credit award to be 224 custody credits (150 actual and 74 conduct).

Defendant appealed, and this court affirmed the judgment. (*People v. Hass* (Nov. 23, 2009, E047475) [nonpub. opn].)

On June 9, 2010, defendant, acting in propria persona, filed an ex parte application and request for additional custody credits, based on the January 25, 2010 amendment to section 4019.[5] Defendant filed the same motion on September 1, 2010. The court denied the motion on September 9, 2010. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant is Not Entitled to Additional Conduct Credits

A. *The Amendment to Section 4019 Does Not Apply Retroactively*

Defendant contends that the amendments to sections 4019 and 2933 apply retroactively to increase his presentence custody credits by 76 days. We disagree.

When defendant committed the crime in the instant case, as well as when he was sentenced, section 4019 provided that a defendant was entitled to two days of conduct credit for every four days of presentence custody. (Former § 4019, Stats.1982, ch. 1234, § 7, p. 4553.) Effective January 25, 2010, however, section 4019 was amended to provide that a defendant was entitled to two days of conduct credit for every two days of presentence custody. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) We note that, effective September 28, 2010, the statute was again amended to restore the former formula. (Stats. 2010, ch. 426, § 2.) By its terms, however, that amendment applies only to offenses committed after its adoption.

---

[5] The court denied the motion, based on its mistaken belief that it had already addressed the issue.

The question of whether a defendant sentenced before January 25, 2010, is entitled to the benefit of the 2010 amendment to section 4019 is currently before the California Supreme Court. (See *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.) Because the California Supreme Court will ultimately resolve the conflict on the issue among the various Courts of Appeal, we discuss the issue only briefly.

Under section 3, "'[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753 (*Alford*).) Neither the bill that amended section 4019 nor the legislative history contains any such clear and compelling implication. Therefore, the amendment applies prospectively only. We recognize that, under *In re Estrada* (1965) 63 Cal.2d 740, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id*. at p. 748.) Presentence conduct credits, however, are not a mitigation of punishment. Rather, they are a means of encouraging and rewarding behavior. (*People v. Brown* (2004) 33 Cal.4th 382, 405.) Accordingly, the section 3 presumption of prospective application is not rebutted.

Defendant argues that the Legislature's sole intention in enacting the bill that amended section 4019 and provided the increased conduct credits was to save the state money by granting early release to certain prisoners. However, section 4019 was

designed at least in part to facilitate management of prisoners by motivating compliant behavior while in local custody. (See § 4019, subd. (c)(1).) This objective cannot be served by a retroactive application of the amendment of section 4019, as "it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*).)

We conclude that the January 25, 2010 amendment of section 4019 is not retroactive.

B. *The Amendment to Section 2933 Does Not Apply Retroactively*

Defendant further argues that the amendment to section 2933, which became effective on September 28, 2010, "should similarly be found to operate retroactively."[6] We disagree.

Former section 2933, subdivision (e), provided credit for time spent in local custody after the date a defendant was sentenced to prison. Effective September 28, 2010, the Legislature amended section 2933 to give eligible prisoners for whom a state prison sentence was executed one day of conduct credit for each day actually served in presentence custody. (§ 2933, subd. (e)(1)-(3), added by Stats. 2010, ch. 426, § 1.) In other words, for defendants sentenced to state prison who do not have any past or present convictions for serious or violent felonies, and who are not subject to registration as a sex offender, amended section 2933 now governs their entitlement to

---

6 We note that, in his reply brief, defendant claims he is entitled to an additional 150 days of presentence conduct credit under the amendment to section 2933, whereas, in his opening brief, he claimed an increase of 76 days of credit.

presentence conduct credits. (§ 2933, subd. (e)(1).) Those disqualified by their status are limited to the section 4019 scheme of two days of conduct credit for four days in custody. (§§ 2933, subd. (e)(3), 4019.)

Defendant points out that the September 28, 2010 amendments to both sections 4019 and 2933 were enacted through the passage of Senate Bill No. 76, and that the amendment to section 4019 specifically provides that it applies to crimes committed on or after the effective date of the amendment. (§ 4019, subd. (g).) He then speculates that the Legislature's inclusion of a provision for prospective application of the changes to section 4019, and not to section 2933, is "strong evidence that the Legislature deliberately omitted a provision for prospective application from section 2933." He concludes that amended section 2933 should thus apply retroactively. However, as explained *ante*, section 3 clearly provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." We presume the amendment "'operate[s] prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]' [Citation.]" (*Alford, supra*, 42 Cal.4th at p. 753.) There is no express declaration of retroactivity or any "clear and compelling implication" that the Legislature intended the amendment to section 2933 to operate retroactively. Consequently, for the same reasons we concluded that the January 25, 2010 amendment to section 4019 does not apply

retroactively, we conclude that the September 28, 2010 amendment to section 2933 does not apply retroactively.[7]

C. *Defendant Is Not Entitled to Enhanced Credits Under Equal Protection Principles*

Finally, defendant argues that he is entitled to the 76 additional days of custody credits under sections 4019 and 2933 because equal protection requires that the amendments be applied retroactively. We disagree.

Defendant contends that he is similarly situated to, but receiving a credit award that is disparate from, prisoners whose judgments of conviction became final after the amendments to sections 4019 and 2933 became operative. However, the purported equal protection violation here is temporal, and "'[t]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' [Citation.]" (*People v. Floyd* (2003) 31 Cal.4th 179, 191 (*Floyd*).) Furthermore, "'[i]n the context of equal protection, "[a] refusal to apply a statute retroactively does not violate the Fourteenth Amendment." [Citation.] Equal protection is not denied where an amendatory statute reducing a penalty is not applied to persons whose convictions were final before the effective date of the ameliorative amendment. [Citation.]'" (*Stinnette, supra*, 94 Cal.App.3d at

[7] We note the People's argument that the amendment to section 2933 is inapplicable here because the California Department of Corrections and Rehabilitation, rather than the trial court, is responsible for calculating credits under that section. Because we conclude that the amendment to section 2933 does not apply retroactively, we find it unnecessary to address this issue.

p. 806.) The only requirement is that the classification between those sentenced before and after the amendment be reasonably related to a legitimate public purpose. (*Ibid*.) Here, the Legislature had the legitimate purpose of motivating good conduct. As the *Stinnette* court noted, "[r]eason dictates that it is impossible to influence behavior after it has occurred." (*Ibid*.) Thus, affording increased conduct credits as of the effective date of the amendment was reasonably related to a legitimate purpose, and there was no equal protection violation. (See *Ibid*.)

Defendant relies on *In re Kapperman* (1974) 11 Cal.3d 542, which is not applicable here. *Kapperman* held that an express prospective limitation upon the statute creating presentence custody credits was a violation of equal protection because there was no legitimate purpose to be served by excluding those already sentenced. (*Id*. at pp. 544-545.) *Kapperman* is distinguishable because it addressed actual custody credits, not conduct credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.

In sum, defendant is not entitled to additional conduct credits under the amendments to section 4019 or section 2933, as his right to equal protection has not been violated.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

MILLER
J.